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In The

Supreme Court of the United States

October Term, 1984

SOUTHERN PACIFIC COMMUNICATIONS COMPANY, *et al.*,

Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION RESTATED

Petitioners do not seek review of any portion of the court of appeals' decision on the merits of the antitrust issues involved in this case. Instead, they seek only to have this Court review that portion of the decision finding that petitioners had failed to establish the factual predicates to their claim of bias against Judge Charles R. Richey—the judge who presided over the case for four years, who tried it as a bench matter after petitioners waived a jury, and against whom petitioners had never remotely suggested bias until after his decision in the case was rendered.

Under these circumstances, the question presented by the petition has nothing to do with antitrust law or telecommunications regulation. Instead, the question is:

> Whether this Court should review the findings of the court of appeals that petitioners have shown neither disqualifying bias nor any improper influence of personal views upon the trial court's decision where the petition repeats the same factual contentions that were considered and rejected as "unsupported" by the court of appeals after a full review of the record, and where the court of appeals applied established legal principles in reaching that conclusion.

STATEMENT REQUIRED BY RULE 28.1

Respondent American Telephone and Telegraph Company ("AT&T") has no parent company. In addition to other wholly-owned subsidiaries, AT&T has ownership interests either directly or through wholly-owned subsidiaries in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Gold Star Fiber Optics Co., Ltd; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; and ShareTech, Inc.

The complaint in this case also named as defendants twenty-four operating telephone companies that were then subsidiaries of AT&T. The current parents, subsidiaries and affiliates of these operating telephone companies are as follows:

Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company and Wisconsin Bell Inc. (formerly the Wisconsin Telephone Company) are all wholly-owned subsidiaries of American Information Technologies Corporation and have no subsidiaries. The Ohio Bell Telephone Company is a wholly-owned subsidiary of American Information Technologies Corporation and has ownership interests in The Chillicothe Telephone Company and The Champaign Telephone Company. American Information Technologies Corporation has no parent company. In addition to wholly-owned subsidiaries, American Information Technologies Corporation has an ownership interest in Northern Information Technology, Inc.*

The Bell Telephone Company of Pennsylvania, The Diamond State Telephone Company, The Chesapeake and Potomac Tele-

*Bell Communications Research Corp. is jointly owned by American Information Technologies Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, The Pacific Telesis Group, Southwestern Bell Corporation and U S WEST, Inc., either directly or through wholly-owned subsidiaries.

phone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, and New Jersey Bell Telephone Company are all wholly-owned subsidiaries of Bell Atlantic Corporation and have no subsidiaries. Bell Atlantic Corporation has no parent company. In addition to wholly-owned subsidiaries, Bell Atlantic Corporation has an ownership interest in Telecommunications Specialists, Inc.

South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company are wholly-owned subsidiaries of BellSouth Corporation and have no subsidiaries other than wholly-owned subsidiaries. BellSouth Corporation has no parent company and has no subsidiaries other than wholly-owned subsidiaries.

New England Telephone and Telegraph Company and New York Telephone Company are wholly-owned subsidiaries of NYNEX Corporation. New York Telephone has no subsidiaries other than wholly-owned subsidiaries and New England Telephone has no subsidiaries. NYNEX Corporation has no parent company and has no subsidiaries other than wholly-owned subsidiaries.

Pacific Bell (formerly The Pacific Telephone and Telegraph Company) is a subsidiary of The Pacific Telesis Group and has no subsidiaries other than wholly-owned subsidiaries. Nevada Bell (formerly Bell Telephone Company of Nevada) is a subsidiary of The Pacific Telesis Group and has no subsidiaries. The Pacific Telesis Group has no parent company and has no subsidiaries other than wholly-owned subsidiaries.

Southwestern Bell Telephone Company is a wholly-owned subsidiary of Southwestern Bell Corporation and has no ownership interests in any companies other than wholly-owned subsidiaries. Southwestern Bell Corporation has no parent company and has no subsidiaries other than wholly-owned subsidiaries.

The Mountain States Telephone and Telegraph Company, Pacific Northwest Bell Telephone Company, and Northwestern Bell Telephone Company are all wholly-owned subsidiaries of U S WEST, Inc. and have no subsidiaries other than wholly-owned subsidiaries. U S WEST, Inc. has no parent company and has no subsidiaries other than wholly-owned subsidiaries.

The Southern New England Telephone Company ("SNET") has no parent company. In addition to wholly-owned subsidiaries, SNET has an ownership interest in SONECOR Credit Corporation.

Cincinnati Bell Telephone Company (formerly Cincinnati Bell Inc.) is a wholly-owned subsidiary of Cincinnati Bell Inc. Cincinnati Bell Enterprises Inc. is a wholly-owned subsidiary of Cincinnati Bell Inc. Cincinnati Bell Supply Company, a wholly-owned subsidiary of Cincinnati Bell Enterprises Inc., is a 49 percent partner in a joint venture with Anixter Bros., Inc. Cincinnati Bell Cellular Systems Company, a wholly-owned subsidiary of Cincinnati Bell Enterprises Inc., is a 46 percent partner in a joint venture with American Information Technologies Corporation.

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BRIEF IN OPPOSITION

Petitioners (hereinafter "SPCC")[1] seek to have this Court review that portion of the decision of the Court of Appeals for the District of Columbia Circuit finding that they had failed to establish the factual predicates to their claim of bias against Judge Charles R. Richey.[2] Respondents (hereinafter "AT&T") demonstrate below that this case does not warrant review by this Court. The petition simply repeats the factual assertions presented by

[1]Although petitioners herein are formally listed as Southern Pacific Communications Company and Transportation Microwave Corporation, both companies were sold by the Southern Pacific Company to GTE Corporation in 1983. The cause of action in this case was retained by the Southern Pacific Company.

[2]The court of appeals' decision is set forth in petitioners' Appendix A (hereinafter "App. A- "). The trial court's decision is set forth in petitioners' Appendix B (hereinafter "App. B- ").

SPCC to the court of appeals, while ignoring the court of appeals' conclusion, after reviewing the matter thoroughly, that each of these factual assertions was unsupported by the record. Thus, the question actually presented by the case relates to factual issues, not legal issues, and would require virtually *de novo* review by this Court of the full record—a function which to respondents' knowledge this Court has never undertaken in circumstances such as these.

COUNTERSTATEMENT OF THE CASE

Although SPCC has submitted a "Statement of the Case" focused upon the allegations underlying its antitrust claim (Pet. at 4-10)—allegations which AT&T disputes and which have already been rejected by the trial court and the court of appeals[3]—the merits of SPCC's antitrust claims are not raised by the petition. Set forth below are the background facts relevant to an understanding of SPCC's bias claim raised anew in this Court.

A. The Proceedings In The Trial Court

SPCC filed its complaint in 1978, alleging violations of Sections 1 and 2 of the Sherman Act and demanding a trial by jury. AT&T promptly filed a motion to dismiss on the ground that the conduct challenged by SPCC was subject to pervasive regulation by the FCC and state agencies and was therefore immune from challenge under the Sherman Act. In October 1978, the case was assigned to Judge Richey. In July 1979, Judge Richey denied AT&T's motion and ordered discovery to commence. After

[3]The conclusions of the court of appeals on the merits of SPCC's claims are set forth at App. A-42-60. SPCC's Statement principally discusses SPCC's claim that AT&T sought to drive out competition through AT&T's "Telpak" and "Hi/Lo" tariffs. Not only did the court of appeals here uphold the trial court's findings that neither tariff was predatory or otherwise unlawful (App. A-42-53), but the Court of Appeals for the Seventh Circuit in the *MCI* case similarly found both Telpak and Hi/Lo to be lawful. *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1111-31 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983).

three years of discovery supervised by Judge Richey, and shortly before trial was to begin, SPCC waived its jury demand for the specific purpose of trying its case before Judge Richey.

In its opening statement, SPCC claimed that its evidence would show conclusively that AT&T had violated its interconnection obligations under FCC decisions and had engaged in predatory pricing of every one of its services that was in competition with SPCC's services. SPCC further asserted it would offer internal AT&T documents and speeches by AT&T executives that would show that all of the conduct of AT&T was an intentional effort to flout clear FCC requirements in order to destroy SPCC and other similar companies.

Judge Richey was clearly impressed by this opening statement, characterizing it as "brilliant" (Tr. 3270) and, at least at the beginning of its case, Judge Richey doubtless expected that SPCC would introduce the evidence it claimed it had in the opening statement. Thus, early in the trial, when AT&T's counsel described SPCC's case as "fabricated," Judge Richey severely chastized counsel and demanded that he apologize to SPCC's counsel (Tr. 938).

As the evidence came in during SPCC's case-in-chief, however, it became perfectly obvious that SPCC was not proving its charges. Again and again, the testimony of SPCC's witnesses was contradicted by their own contemporaneous documents or was refuted by other SPCC witnesses. Again and again, SPCC's witnesses conceded that they were unable to substantiate their allegations. Again and again, the internal documents cited by SPCC as evidence of AT&T's anticompetitive intent did not remotely support the contention. And again and again, SPCC's witnesses admitted that SPCC had never been injured by the challenged conduct of AT&T.[4]

[4]Although the details of the problems of SPCC's proof are not necessary to an understanding of the bias issues before this Court, many of

(Footnote continued on next page.)

The shortfalls in SPCC's proof plainly dismayed Judge Richey, who repeatedly stated his "concern" over the voids and inconsistencies in SPCC's case (*e.g.*, Tr. 805, 2182-83, 3490-91) and frequently asked SPCC's counsel if the court had "overlooked" something in SPCC's evidence, stating that he was "willing to be shown" if SPCC had the evidence to support its claims (*e.g.*, Tr. 1654, 2174, 2182, 2232-33, 3443). Judge Richey gave SPCC every opportunity to present its case and to supplement its evidence to provide more convincing proof to support its claims.[5]

Judge Richey also allowed SPCC's counsel frequent opportunities to argue, in the midst of trial, what SPCC believed the evidence showed and how it fit into SPCC's theory of the case

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these conflicts and inconsistencies—particularly those most disturbing to Judge Richey—are noted in the trial court's findings of fact. Thus, for example, during the trial Judge Richey stated his concern that the credibility of SPCC's entire case was undercut by the testimony of Southern Pacific's Chairman that he had never raised any of SPCC's complaints of unfair treatment with AT&T until just before the complaint was filed, even though he met frequently with AT&T's Chairman, both in connection with business matters and socially, during the period SPCC alleged it was mistreated (Tr. 3490-91). Judge Richey reiterated that view in his opinion (App. B-234), contrasting the lack of complaints by SPCC with the testimony of a senior executive of General Electric who stated that he would have immediately complained to AT&T's Chairman if he thought AT&T employees were not giving his company fair treatment (*id.*).

[5]During the trial itself, Judge Richey deferred ruling on AT&T's motion to strike SPCC's damage study as inadequate, thus permitting SPCC a further opportunity to show that its damage model was based on reasonable assumptions, and permitting SPCC eventually to introduce three different damage models (App. B-406); he denied AT&T's motion to strike certain of SPCC's allegations (Order, May 21, 1982), leaving "open the opportunity for plaintiffs to further explicate their positions" (App. B-250); he allowed SPCC an additional opportunity to supplement the record at the close of its case (Tr. 3106); and he deferred AT&T's motion to dismiss under Rule 41(b) after SPCC's case-in-chief, thereby requiring AT&T to present its defense.

(*e.g.*, Tr. 785-866, 921-44, 1202, 1381-1450). SPCC's counsel "welcomed" the opportunity to obtain the judge's reactions to the evidence during the trial (Tr. 930-31, 1202, 1381-82, 1422, 1759), and often asked Judge Richey to give his comments, concerns or questions to counsel (*e.g.*, Tr. 2182). Ironically, much of what SPCC now cites as "evidence" of bias originated in Judge Richey's informal comments about the evidence and arguments presented by SPCC—comments SPCC's counsel invited and which, at the time, SPCC's counsel said he welcomed, thanking the judge for his helpful candor.[6]

Although, in the informal atmosphere of a bench trial, Judge Richey felt free to express openly questions and comments about SPCC's evidence, the judge emphasized at the outset that his remarks should not be taken as indicating that he had reached a conclusion on the merits (Tr. 866).[7] Moreover, Judge Richey made clear that the personal views he occasionally expressed in the informal banter during these colloquies would not affect his application of the antitrust laws to the evidence presented (Tr. 3982). Throughout the trial, Judge Richey stated that he had not yet reached a conclusion on the merits (*e.g.*, Tr. 1827, 6155), and that he intended to decide the case properly on the full record at

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[6]For example, in concluding a lengthy mid-case summary of SPCC's theory of liability, SPCC's counsel said (Tr. 1422):

> "MR. AILES [SPCC lead trial counsel]: Your Honor, again I want to express my appreciation to you for the opportunity to address some of these matters. I hope I have at least clarified our stance with respect to them. You said the other day that you had questions and were going to have them; and I say, as I began, that we absolutely welcome the opportunity to address them and get our comprehension of what the problem is all about before you."

[7]In discussing the facts as he saw them, Judge Richey was not dogmatic; rather, he would specifically ask whether there was anything in the record contrary to the court's impression, or whether SPCC's counsel disagreed with the comment (*e.g.*, Tr. 127, 804-05, 2241-42, 3423).

the end of the trial.[5] Indeed, he stated that it was his fervent desire to make this case a model of fairness (*e.g.*, Tr. 3101):

> "I know that the day is going to come when one side, or perhaps both, are going to be disappointed. The only thing that I hope and pray is that when it is over, that those who are disappointed, one or both sides, will at least feel that the Judge tried to be fair."

As the trial progressed, SPCC was never able to deliver on its repeated promises to fill in the voids identified by the trial judge. At the conclusion of SPCC's case-in-chief, AT&T moved to dismiss SPCC's action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The court recessed the trial to receive briefs and to allow the parties oral argument on that motion, and several days later the court informed the parties that the ruling on the motion to dismiss would be deferred until all the evidence was in.

During the presentation of AT&T's case, SPCC was unable to make any headway whatever in establishing a basis for its claims. And SPCC's rebuttal case was even weaker than its case-in-chief. For example, one of SPCC's rebuttal witnesses introduced a study of SPCC's profits and sales records which, he candidly conceded, could be interpreted as demonstrating that there was no basis for concluding that SPCC had suffered any injury at all from any action by AT&T (Brown, PX6-0031 at 3; Brown Tr. 5946).

At the close of the record, both parties submitted proposed findings of fact and conclusions of law pursuant to the trial court's

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[5]This critical point was emphasized repeatedly: Tr. 212 ("You can be assured . . . [that] this Court is going to judge this case on the evidence which the Court receives"); Tr. 938 ("[This case] is going to be done right, without regard to whose ox is gored"); Tr. 1638 ("I expect to spend a great deal of time in study with no phones or anything else, after this is over. I am not going to deliver my opinion from the bench"); Tr. 1747-48 ("[T]he Court will . . . decide this case properly. If there is anything I have ever wanted to do, it is to do that in this case because I know how important it is").

usual procedure. Not surprisingly given the huge record,[9] each side submitted proposed findings and conclusions that were several hundred pages in length. After working on his opinion for more than five months, Judge Richey issued a 603-page decision giving detailed consideration to the evidence presented on each of SPCC's claims. Although relying in large part on the proposed findings prepared by AT&T (with editorial changes), and to a lesser extent on those prepared by SPCC, Judge Richey also added extensive additional findings—amounting to more than 100 pages of material not taken from either party's findings (*see* App. A-13). Based on the entire record, the trial court concluded that SPCC had not met its burden of proof and entered judgment for AT&T.

As a brief postscript to his comprehensive opinion, Judge Richey included in the "Conclusion" section of his opinion some personal observations about the nature of the issues in the case. Noting the evidence that SPCC and other specialized carriers served only routes between large cities where costs were low and profits high, the judge stated his personal view that such competition would not promote the goal of universal service—reliable low cost service for all (App. B-448-49). Quoting former FCC Commissioner Benjamin L. Hooks, who had warned in a speech in 1973 that such unequal competition might destroy the Bell System and that destruction of the Bell System might have catastrophic effects upon the public (App. B-453-54), Judge Richey expressed his concern that it may be necessary for Congress to examine the problem of how the universal service goal can be maintained in the future (App. B-449). Judge Richey further stated his view that it was the FCC's failure to take the initiative and deal promptly with the issues, such as the proper costing standards to be used by AT&T in the pricing of its competitive service, rather than any anticompetitive intent by AT&T, that had creat-

[9]The record below, which the court of appeals aptly described as "enormous" (App. A-3), consisted of the written testimony of approximately 175 witnesses, covering thousands of pages, over 5,900 pages of oral testimony, and over 9,700 exhibits.

ed the series of disputes which eventually led to the antitrust charges litigated by SPCC. Judge Richey concluded: "Had the FCC not engaged in its usual regulatory lag and dealt forthrightly and properly with the problems as they arose, then few, if any, of the cases would now be before the antitrust Courts, such as this one" (App. B-450).

These views were confined to the "Conclusion" section of the opinion, and they were not relied on or mentioned by Judge Richey as a basis for his findings that SPCC had failed to carry its burden of proof under the Sherman Act. Indeed, far from rejecting the pro-competitive decisions of the FCC and the traditional antitrust analysis of the Sherman Act, Judge Richey's decision on the merits found that AT&T's conduct challenged by SPCC had been *in compliance with* the FCC's decisions and the Sherman Act.

SPCC did not move for reconsideration by the trial court. Several months later, however, it filed a Rule 60(b) motion predicated on the argument—raised for the first time—that Judge Richey should vacate his judgment for AT&T and enter judgment for SPCC on collateral estoppel grounds. SPCC briefed and argued this post-judgment motion before Judge Richey without ever mentioning the bias claim that forms the only basis for its petition to this Court.[10]

B. The Decision Of The Court Of Appeals

SPCC raised its bias claim for the first time in its appellate brief. As in its petition in this Court, SPCC claimed in the court of appeals that Judge Richey had approached the trial with a fixed preconceived policy view that competition was wrong in the telecommunications industry, and that this policy bias led him

[10]Judge Richey denied SPCC's Rule 60(b) motion (App. D) and that denial was affirmed by the court of appeals in a separate opinion (App. C). SPCC has not sought review of that decision in this Court (*see* Pet. at 1 n.1).

to reject SPCC's evidence, to discount the testimony of its key witnesses, particularly those formerly employed by the FCC, and to adopt mechanically the proposed findings submitted by AT&T. To support these charges, SPCC pointed to a series of quotations from Judge Richey's comments and questions during the trial as well as to the concluding portion of his opinion—the same selected quotes presented in its petition here. Based on the alleged bias, SPCC asked the court of appeals to reverse summarily without further review of the record, or in the alternative, to review the record only to determine whether or not the trial court's policy views "substantially influenced" the fact finding. SPCC made no serious effort to seek reversal if the case were to be reviewed under the clearly erroneous standard, effectively conceding that there was substantial evidence in the record to support each of the trial court's findings (App. A-33 n.17).

The court of appeals, in an opinion for the unanimous panel written by Judge Harry T. Edwards, was clearly troubled by the fact that in this case the trial judge expressed personal opinions in the concluding section of his findings of fact. While acknowledging that all judges have personal views on law or policy matters that come before them (App. A-18-19), the court of appeals apparently felt that given the importance of this case, this expression of personal views justified what it described as a "painstaking" review of the entire record below in order to consider "with the greatest of care" the bias allegation (App. A-4, A-5, A-31). This thorough review delayed the issuance of the opinion for several months (App. A-35). However, when it was completed, the court of appeals concluded that SPCC had substantiated none of its claims and indeed, that the full record contained strong evidence contradicting SPCC's assertions (App. A-31, A-34).

The court of appeals' decision is based first on its finding that SPCC had failed to establish "either prong" of its argument that Judge Richey had approached the trial with a fixed, preconceived policy bias (App. A-20). Although there was no question that, by

the *end* of the case, Judge Richey was convinced by the evidence he had heard that AT&T had not violated the antitrust laws and, indeed, had been correct in telling the FCC that competition would have adverse effects on the public interest in universal telephone service, the court of appeals found no support whatever in the record for SPCC's charge that Judge Richey held these views before the trial. The court of appeals noted particularly that, contrary to SPCC's claim that Judge Richey never believed that the antitrust laws should be applied to AT&T, he had denied AT&T's immunity motion before the trial and had revised that view only in response to the evidence presented at trial (App. A-20). As the court of appeals observed, this change in views, resulting from the evidence presented, "hardly supports SPCC's charge of bias" (App. A-20).

The court of appeals also found that, even assuming that Judge Richey had begun the trial with personal views about competition, SPCC had failed to establish that he held these views with an "irrevocably closed mind" (App. A-21). Citing Judge Richey's rulings denying AT&T's motions to strike certain claims and dismiss at the close of SPCC's case, the court found that "[o]nce again, the evidence suggests the opposite" (App. A-21). The court of appeals further emphasized Judge Richey's repeated statements during the trial that he had not yet reached a conclusion on the merits, and the fact that Judge Richey had conducted a scrupulously "fair trial"—a fact which, the court of appeals noted, even SPCC conceded when it expressly admitted that it had never been foreclosed from introducing evidence or arguments to support its position (App. A-16, A-21-22).

Having concluded that Judge Richey's views were formed during the trial, based upon the evidence presented, and that he did not have an irrevocably closed mind during the trial, the court of appeals went on to review SPCC's claim that the judge's personal views, even if formed from the evidence presented, impermissibly influenced his fact-finding on the merits. Again, after a detailed

consideration of the record, the court of appeals rejected this contention as unsupported, and indeed contradicted by the full record.

The court of appeals found that there was "no evidence that the Judge's policy views impermissibly influenced" his rulings on the merits (App. A-25). Indeed, the court of appeals observed, even Judge Richey's discussion of the antitrust immunity question was based upon his analysis of the antitrust question of whether AT&T was subject to a pervasive scheme of regulation and not his personal view on whether or not AT&T should have a monopoly in private line telecommunications services (App. A-24-25). And the court of appeals found absolutely "no evidence" that Judge Richey's policy views influenced any other part of his opinion on the merits of SPCC's antitrust claim (App. A-25).

Finally, the court of appeals found no support for SPCC's bias claim in the fact that Judge Richey had ultimately ruled for AT&T on virtually all of the disputed issues in the case. The court rejected SPCC's premise that a statistical analysis of the trial court's rulings could be used to show bias, noting (App. A-28) that such an approach would leave the trial judge with "the apprehension that if he makes a disproportionate number [of rulings] in favor of one litigant, he will have created the impression of bias" (quoting from *In re IBM Corp.*, 618 F.2d 923, 929 (2d Cir. 1980)). Relying on this Court's decision in *NLRB* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), the court of appeals held that even a "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact" (App. A-29).

Summarizing its review of the bias charges, the court of appeals stressed again that it had (App. A-31):

> "examined the trial judge's conduct in considerable detail. We find the plaintiff's charges of bias to be unsupported by the factors SPCC cites, whether considered individually or together as a whole."

As a result, the court of appeals "reject[ed]" the bias charge and, based on that rejection, denied SPCC's requests for summary reversal or abandonment of the clearly erroneous standard in reviewing the merits (App. A-31). Affirming the trial court's decision, the court of appeals concluded that the decision could be sustained on Judge Richey's findings that AT&T's conduct did not violate the Sherman Act (App. A-42).

REASONS FOR DENYING THE WRIT

I. THE WRIT IS PREDICATED UPON THE SAME FACTUAL CONTENTIONS OF BIAS THAT WERE REJECTED AS "UNSUPPORTED" BY THE COURT OF APPEALS.

SPCC's petition for review of the court of appeals' decision is based upon a series of factual contentions—namely (1) that Judge Richey "approached the trial of this case with the firm conviction that AT&T's monopoly over private line services was in the public interest" (Pet. at 12); (2) that his decisions on the merits, including his credibility rulings and application of the Sherman Act standards to the facts, were "influenced" by these personal convictions (Pet. at 14); and (3) that as a result, he simply copied in a "completely uncritical manner" the proposed findings submitted by AT&T (Pet. at 18). It is only because of "this combination of factors" (Pet. at 20) that SPCC claims to be entitled to a new trial. Moreover, implicit in SPCC's entire argument is the acknowledgement that absent SPCC's factual contentions that bias existed and that it improperly influenced the decision and fact-finding process, SPCC has no claim that the court of appeals committed error.

Every one of these factual contentions—and every single record excerpt cited by SPCC to support these outlandish charges—was examined by the court of appeals against the entire record "with particular, even painstaking, care" (App. A-5). In

every instance, the court of appeals found that these factual contentions were "unsupported by the factors SPCC cites, whether considered individually or together as a whole" (App. A-31) and further that the actual record "hardly supports SPCC's charge of bias" and indeed "suggests the opposite" (App. A-20, A-21).

Thus, SPCC's first premise—that Judge Richey approached the case from the outset with preconceived policy views opposed to competition—is predicated entirely on the same record snippets raised previously in the court of appeals, notwithstanding the fact that in several instances the court of appeals took specific note that the record citations relied on by SPCC were quoted out of context or with a distorted meaning (*see* App. A-16 n.8; A-22 n.13).[11] Moreover, SPCC does not even attempt to deal with the court of appeals' conclusion that Judge Richey's early ruling denying AT&T's immunity motion effectively refutes SPCC's contention that Judge Richey had always believed that AT&T's conduct should be immune from the antitrust laws.[12]

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[11]There are numerous other examples of clear distortions of the record in SPCC's selective quotations. For example, SPCC asserts that the trial court approached the trial from the outset with the firm belief that competition in telecommunications was wrong as a matter of national policy (Pet. at 14-15). Yet, very early in the trial, Judge Richey said, in a portion of the transcript omitted from the excerpts quoted by SPCC, that he viewed the competition permitted by the FCC as "a wholesome thing" (Tr. 864).

SPCC also distorts the record below by changing Judge Richey's questions (Tr. 1415, 4146) into apparent affirmative statements (Pet. at 15 n.8). Other SPCC references (Pet. at 14 n.7) portray as Judge Richey's affirmative statements his quotations from the testimony of former FCC Commissioner Benjamin L. Hooks (Hearing of March 30, 1983, Tr. 33) or his simple observation of the undisputed fact that many federal and state regulators historically supported the Bell System's franchised monopoly as being in the public interest (Tr. 6060).

[12]SPCC merely repeats in its petition its allegation raised in the court of appeals that Judge Richey's personal views "may" stem from his service from 1967 to 1971 as General Counsel of the Maryland Public Service Commission (Pet. at 17 n.12). However, SPCC fails to explain

(Footnote continued on next page.)

SPCC simply ignores these findings, and offers this Court no reason for concluding that the court of appeals misinterpreted the record on this question.

Likewise, SPCC's argument that Judge Richey abdicated his judicial responsibilities by "uncritically rubber-stamping" the proposed findings submitted by AT&T (Pet. at 20) entirely ignores the court of appeals' finding that Judge Richey did not mechanically copy AT&T's proposed findings in drafting his decision, but rather edited those findings and elaborated on them where he thought it necessary (App. A-26-27). Apart from SPCC's repeated insistence that Judge Richey's findings were copied uncritically, SPCC again does not provide any basis for this Court to reexamine the record below.[11]

SPCC's claim that Judge Richey's personal convictions impermissibly influenced his decision on the merits is also refuted by the court of appeals' finding that there was "*no evidence* that the Judge's policy views impermissibly influenced" his rulings

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how this position, which did not directly involve SPCC or the issues in this case, could have led the trial judge to a bias against SPCC or to a prejudgment of the merits of SPCC's claims. Moreover, SPCC clearly knew of Judge Richey's prior service when it waived its jury demand—the fact was even mentioned at the pre-trial conference in which SPCC announced its jury waiver (Hearing of February 22, 1982, Tr. 3).

[11]SPCC asserts that mechanical copying is demonstrated by the fact that Judge Richey adopted AT&T's proposed findings describing his mental processes. In reviewing these same assertions, the court of appeals found that AT&T's proposed findings had reflected Judge Richey's own comments expressed during the trial and thus the fact that Judge Richey eventually adopted these findings did not lead to the conclusion that they did not in fact represent his own thinking (App. A-27). For example, SPCC cites an adopted finding stating that "the court has read every single document to which plaintiffs have directed its attention." As AT&T pointed out to the court of appeals, however, that proposed finding was predicated on Judge Richey's identical statements during trial that he had, in fact, read every document offered by SPCC (*e.g.*, Tr. 2182, 3146).

on the merits (App. A-25). (Emphasis supplied.) Nevertheless, SPCC—citing the same matters it presented below as evidence of improper influence—raises the issue in this Court as if the court of appeals had never considered the question at all.[14]

The fact-bound nature of SPCC's argument is perhaps best exemplified by SPCC's challenge to Judge Richey's credibility findings (Pet. at 26-28). SPCC claims that these credibility findings "are based on grounds divorced from the accepted standards for judging credibility of expert witnesses" (Pet. at 28), and thus can only be explained by an "FCC-phobia" (Pet. at 16 n.11) that led Judge Richey to disbelieve former FCC officials, such as former FCC Common Carrier Bureau Chief Walter Hinchman, who had played a role in opening up the telecommunications industry to competition (Pet. at 27).[15] But SPCC's fundamental premise—that Judge Richey's credibility conclusions had no

[14]SPCC asserts, for example, that Judge Richey did not base his immunity decision on the recognized standard of whether or not AT&T was subject to "pervasive regulation" but rather on his personal views (Pet. at 25). But the court of appeals found that Judge Richey had based his decision on the fact that the conduct at issue was "pervasively regulated," a factual conclusion the court of appeals ultimately reversed (App. A-25). The court of appeals, moreover, emphasized that the entire immunity discussion, and Judge Richey's expression of his own observations following that discussion, were all set forth in a "conclusion" that was added "almost as an afterthought" (App. A-25 n.15) to his opinion.

[15]SPCC challenges, for example, Judge Richey's criticism of Mr. Hinchman for removing documents from FCC files upon leaving the Commission (Pet. at 16 n.11). Judge Richey found, and SPCC does not dispute, that Mr. Hinchman removed documents from FCC files that were subject to an AT&T subpoena and an outstanding retention order issued by Judge Joseph C. Waddy in *United States* v. *American Tel. & Tel. Co.*, C.A. No. 74-1698 (D.D.C.) (Order dated February 20, 1975), and that Mr. Hinchman thereby deprived AT&T for several years—up to the middle of the *SPCC* trial—of access to the only copy of a crucial document supporting the reasonableness of AT&T's tariffs. As Judge Richey said, the removal of the document under these circumstances "[a]t the very least . . . impinges on the integrity of Mr. Hinchman" (App. B-116 n.94).

explanation apart from bias—was specifically rejected by the court of appeals, which found that Judge Richey's credibility findings were in fact based on "legitimate considerations, such as demeanor, objectivity, expertise, experience, and the logic of the testimony" that "have a basis in the record" (A-30 n.16).[16] And the court of appeals was unquestionably correct in viewing the matter in these terms because the factual premise of SPCC's argument to the contrary—the existence of some kind of "FCC-phobia"—cannot be squared with the fact that other FCC officials, also prominent in opening up the telecommunications industry to competition, were found to be credible by Judge Richey.[17] The court of appeals' holding that Judge Richey's credibility rulings did not demonstrate bias is, therefore, fully supported by the record.[18]

Moreover, that holding is amply supported by precedent. Courts relying on factual circumstances similar to those noted by the court of appeals in this case have not hesitated to reject claims of bias. This Court, for example, has found that a trial judge's statement during the trial that he had not yet made up his mind

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[16]Indeed, District Judge Dickenson Debevoise, reviewing the testimony of Mr. Hinchman from the *SPCC* trial in another case, concluded, like Judge Richey, that the *SPCC* record called into question the objectivity of Mr. Hinchman and his staff at the FCC and the trustworthiness of the FCC decisions written under Mr. Hinchman's direction. *Glictronix Corp.* v. *American Tel. & Tel. Co.*, 1985-1 Trade Cas. ¶ 66,340 (D.N.J. 1984).

[17]These former FCC officials included Jack Pettit, a former General Counsel of the FCC, who assisted in the FCC's defense of its authority to open the private line market to competition; Paul Darling, a former Chief of the Common Carrier Bureau's Tariff Branch; and Stanford Weinstein, one of Mr. Hinchman's principal staff assistants.

[18]SPCC's argument that Judge Richey uniformly found SPCC's witnesses to be unbelievable also rests upon a premise contradicted by the record, for Judge Richey specifically found the testimony of SPCC's Chairman, Benjamin Biaggini, to be "convincing" and "forthright" and Judge Richey described Mr. Biaggini as "a man whom I obviously respected just almost on sight" (App. B-285; Tr. 3490).

was sufficient to refute a claim that the trial judge had determined to rule against the defendant from the outset of the case. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). Other cases have found claims of bias to be unsupported by the record where the trial judge had never prevented the party charging bias from offering its evidence.[19] And bias charges have also been rejected where the trial judge's comments critical of a party or its witnesses were supported by the record before him.[20]

In these circumstances, it is clear that SPCC's petition is nothing more than an effort to convince this Court with a few scattered quotations from the record below that bias existed, notwithstanding the court of appeals' conclusion, after a review of the full record, that the charges are unsupported. Such a purely factual issue plainly does not warrant review by this Court.[21]

Moreover, the determination of the court of appeals that there was "no evidence" to support SPCC's claim that Judge Richey's personal opinions impermissibly influenced his decision on the merits also puts to rest SPCC's alternative claim here that the court of appeals erred in reviewing the merits under the "clearly erroneous" standard (Pet. at 23-24). SPCC's claim that the clearly erroneous standard is inappropriate in this case depends entirely on a factual allegation that Judge Richey's views in fact "sub-

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[19] *Sealy, Inc.* v. *Easy Living, Inc.*, 743 F.2d 1378, 1383 (9th Cir. 1984) ("Though he made no secret of his skepticism of appellants' position, appellants were permitted to respond to the district court's expressed concerns to the best of their ability").

[20] *See, e.g., SEC* v. *Bartlett*, 422 F.2d 475, 481 (8th Cir. 1970) ("[a] record which reflects an appropriate ground for a trial court's observations refutes any claim of personal bias").

[21] *See, e.g., United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts"); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (the principal responsibility for assessing the record rests with the court of appeals).

stantially influenced" his decision.[22] Because the court of appeals first determined that there was "no evidence" to support such an allegation, there can be no basis for concluding that the court of appeals erred in then turning to review the merits under the clearly erroneous standard. Indeed, once the factual contention of "substantial influence" is disposed of, SPCC does not raise any claim that the court of appeals erred in its review of the substantive antitrust charges.

II. THE COURT OF APPEALS APPLIED ESTABLISHED LEGAL PRINCIPLES IN CONCLUDING THAT, UNDER THE FACTUAL CIRCUMSTANCES PRESENTED, PETITIONERS HAD NOT ESTABLISHED REVERSIBLE ERROR IN THE TRIAL COURT'S DECISION.

In an effort to turn its argument into something other than a purely factual controversy, SPCC also claims that the court of appeals erred in engaging in a "presumption of regularity" (Pet. at 23)—that is, a presumption that the trial judge decided the case on the merits, rather than on his personal views, and that the findings of fact he signed did in fact reflect his consideration of the case. SPCC argues that, under the circumstances it alleged, the court of appeals should have abandoned the presumption of regularity in this case (Pet. at 23).

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[22]SPCC bases its claim on *Kotteakos* v. *United States*, 328 U.S. 750 (1946), holding that an error found by the court of appeals in the decision of a trial court will require reversal where the court of appeals determines that the error had a "substantial influence" on the decision. *Kotteakos*, however, also emphasizes that (*id.* at 764):

> "If, when all is said and done, the conviction is sure that the error did not influence the [trier of fact], or had but very slight influence, the verdict and the judgment should stand. . . ."

The court of appeals' finding that there was no evidence that Judge Richey's views impermissibly influenced the outcome of the case plainly fulfills the requirements of *Kotteakos*.

Essentially, what SPCC is arguing is that even though a review of the record provides no support for its claims, the court of appeals should have assumed—solely from the fact that Judge Richey expressed personal views during the trial and ultimately ruled for AT&T on the merits—that he was biased and permitted his personal views to intrude on his judicial role, unless it can be proved otherwise. Such an argument is absurd and wholly without precedent, as is apparent from the petition itself. Indeed, it is flatly contrary to a whole line of decisions of this Court.

United States v. *Morgan*, 313 U.S. 409 (1941), is directly in point. In that case, the Court upheld the very presumption of regularity attacked here. In doing so, the Court rejected a claim that an administrative official charged with deciding an issue was biased because he had written a letter to the New York Times criticizing a decision of this Court in a matter that was remanded to him. Holding that disqualifying bias had not been shown, the Court said (*id.* at 421):

> "That [the Secretary of Agriculture] not merely held but expressed strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. . . . Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are *assumed* to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption." (Emphasis supplied.)

In *Schweiker* v. *McClure*, 456 U.S. 188, 195-96 (1982), the Court unanimously reaffirmed the presumption recognized in *Morgan* and, in doing so, made clear that the very argument now advanced by SPCC—that the burden of pursuasion ought to be placed on the party defending regularity—will not be accepted:

> "As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in

> judicial or quasi-judicial capacities. We must start, however, from the *presumption* that [judicial or quasi-judicial officers] are unbiased. This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. But the burden of establishing a disqualifying interest rests on the party making the assertion." (Emphasis supplied, footnotes and citations omitted.)[23]

Similar explicit acknowledgements of a presumption of regularity in the face of bias charges are found in other opinions of this Court,[24] and in the opinions of lower federal courts.[25]

The presumption of regularity attacked by SPCC has also been recognized and consistently applied in cases in which the trial

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[23]SPCC relies on *In re Murchison*, 349 U.S. 133 (1955), for the general principle that a fair trial by an impartial judge is a fundamental element of due process (Pet. at 13, 19). As the foregoing quotation from *Schweiker* v. *McClure*, *supra*, makes clear, due process requirements do not preclude the use of an initial presumption of regularity. Indeed, in *Withrow* v. *Larkin*, 421 U.S. 35 (1975), this Court specifically held that such a presumption existed (*id.* at 55) and stated that nothing in *Murchison* required a different result (*id.* at 53-54).

[24]*Hortonville Joint School Dist. No. 1* v. *Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) ("Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances' "); *Withrow* v. *Larkin*, 421 U.S. 35, 55 (1975) (state administrators are "assumed" to be able to fairly decide an issue on the evidence presented absent some "showing to the contrary").

[25]*See, e.g., Ouachita Nat'l Bank* v. *Tosco Corp.*, 686 F.2d 1291, 1300 (8th Cir. 1982), *opinion adopted in relevant part by rehearing en banc*, 716 F.2d 485 (1983); *United States* v. *Baskes*, 687 F.2d 165, 170 (7th Cir. 1981); *United States* v. *Menk*, 406 F.2d 124, 127 (7th Cir. 1968), *cert. denied*, 395 U.S. 946 (1969); *In re Union Leader Corp.*, 292 F.2d 381, 389 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961); *United States* v. *State of Alabama*, 582 F. Supp. 1197, 1201 (N.D. Ala. 1984); *United States* v. *Fiat Motors of North America, Inc.*, 512 F. Supp. 247, 251 (D.D.C. 1981); *United States* v. *PATCO*, 527 F. Supp. 1344, 1356 (N.D. Ill. 1981); *Smith* v. *Danyo*, 441 F. Supp. 171, 175 (M.D. Pa. 1977), *aff'd*, 585 F.2d 83 (3d Cir. 1978); *Duplan Corp.* v. *Deering Milliken, Inc.*, 400 F. Supp. 497, 515 (D.S.C. 1975).

court made extensive use of the proposed findings of a party, or copied proposed findings verbatim. This Court has presumed, absent some specific showing to the contrary, that findings of fact signed by the trial judge do indeed reflect the trial judge's considered opinion on the merits.[26] The decisions of the courts of appeals uniformly hold that even findings copied verbatim are nevertheless to be treated for purposes of appellate review as the findings of the trial court.[27] Where, as here, there is affirmative evidence that the trial judge in fact edited and expanded on the proposed findings, the presumption that the adopted findings do reflect the trial judge's considered opinion on the merits is *a fortiori* justified.[28]

The decisions relied on by SPCC (Pet. at 20) involved factual circumstances entirely different from the case at bar. As the court of appeals observed (App. A-30-31), in almost all of these cases,

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[26] *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964) (the findings of fact "though not the product of the workings of the district judge's mind, are formally his; *they are not to be rejected out-of-hand* and they will stand if supported by the evidence") (emphasis supplied); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944).

[27] *See, e.g., United States* v. *State of Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *Kincade* v. *General Tire & Rubber Co.*, 635 F.2d 501, 504 (5th Cir. 1981); *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). *Accord Afshar* v. *Department of State*, 702 F.2d 1125, 1144 (D.C. Cir. 1983), *Valentino* v. *United States Postal Service*, 674 F.2d 56, 60 n.2 (D.C. Cir. 1982).

[28] *See, e.g., Studiengesellschaft Kohle mbH* v. *Eastman Kodak Co.*, 616 F.2d 1315, 1323 (5th Cir.), *cert. denied*, 449 U.S. 1014 (1980):

> "We note first that the District Court did not adopt Eastman's findings verbatim. There was considerable reworking of Eastman's proposed findings; some were omitted, while others were rearranged, reworded, or otherwise revised. These revisions indicate that the Court was working through the analysis on its own, but finding itself in agreement with Eastman's position. There is absolutely nothing improper with this."

the trial court's conduct during the trial plainly deprived the aggrieved party of due process by interfering with that party's ability to present its case or conduct cross-examination fairly and completely. And in all of these cases, the trial judge made statements before rendering his final decision on the merits that demonstrated personal hostility towards a party, and a closed mind on the merits.[29] Nothing of that kind happened in this case. And certainly, none of these cases stands for the proposition that the presumption of regularity in judicial proceedings is unwarranted under the circumstances presented here.

Thus, SPCC's attack upon the court of appeals' reliance on the presumption of regularity—like its direct attack upon that court's factual findings—must fail. The presumption of regularity is an established principle recognized by this Court, applied throughout the federal judicial system, and necessary to the effective admin-

[29]*Crandell* v. *United States*, 703 F.2d 74, 76-77 (4th Cir. 1983) (the trial court committed "demonstrable error" in interfering with the testimony of plaintiffs' expert witness and in preventing effective cross-examination of defendant's expert witness); *Reserve Mining Co.* v. *Lord*, 529 F.2d 181, 185 (8th Cir. 1976) (the court held a hearing without giving notice to Reserve, permitted Reserve no opportunity to cross-examine witnesses, *sua sponte* called witnesses to testify, testified on its own behalf, and "dispensed with the usual adversary proceeding"); *Knapp* v. *Kinsey*, 232 F.2d 458, 462-64 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956) (the court offered to pay personally for an auditor to be hired by plaintiff for its case, had *ex parte* contacts with a witness for plaintiff, *sua sponte* called a member of the audience to the stand to interrogate him as to why he was present at the trial, and suggested possible witnesses and lines of questions to plaintiff's counsel); *Nicodemus* v. *Chrysler Corp.*, 596 F.2d 152, 155 (6th Cir. 1979) (the trial judge made statements about the motives of Chrysler during the trial that were "both unsupported by the record and unnecessary in the circumstances").

The Eighth Circuit's recent decision in *Gardiner* v. *A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984), is fully consistent with this exceptional line of cases. In that case, the court of appeals focused on the fact that the trial judge, without hearing *any* evidence, publicly censured in the severest terms the top executives of Robins. The Eighth Circuit also noted that the trial judge had freely admitted that he had become an "advocate" for plaintiff and that "I am prejudiced at this point," and that Robins' counsel had registered an immediate protest to the judge's comments—all factors missing in this case.

istration of justice. Without it, the court system would be overrun with baseless claims of bias and prejudgment, for virtually all trial judges have had some potentially relevant preappointment experience that arguably might color their views of the merits, or may have previously expressed their personal or professional opinion on legal or policy issues involved in a case.[30] Moreover, trial judges invariably form opinions on the matters at issue before them, and will naturally express those views.[31] Nor is it unusual or improper for trial judges to use their opinions to call a perceived problem to the attention of the legislature, the responsible regulatory agency or higher courts.[32] In none of these cases

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[30]*See, e.g., Laird* v. *Tatum*, 409 U.S. 824, 835 (1972) (Memorandum of Rehnquist, J.) ("[I]t is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of some particular provision of the Constitution"). *See also Tug Valley Recovery Center* v. *Watt*, 703 F.2d 796, 802 (4th Cir. 1983) ("A criminal defendant may be tried before a judge who was once a prosecutor, and a former legal aid attorney appointed to the bench may preside over a food stamp entitlement case").

[31]*See, e.g., In re IBM Corp.*, 618 F.2d 923, 930 (2d Cir. 1980) (a finding of bias cannot be based on the trial court's rulings, or reactions to the evidence or witnesses at trial, because it is the court's duty to form opinions on these matters in order to reach a decision based on the evidence); *Whitaker* v. *McLean*, 118 F.2d 596 (D.C. Cir. 1941) ("[m]ild expressions of feeling [by judges] are as hard to avoid as the feeling itself").

[32]Judge Harold H. Greene, in the course of ruling on issues related to the modified final judgment in *United States* v. *Western Electric Co.*, No. 82-0192 (D.D.C.), has expressed his personal views on the public benefits of universal telephone service in comments that parallel those of Judge Richey in the present case. Judge Greene has openly criticized the FCC's Access Charge Order as contrary to the public interest because it "unnecessarily jeopardizes" the goal of universal service. *See* 569 F. Supp. 1057, 1091 (D.D.C. 1983); Hearing of June 2, 1983 at Tr. 25465-67; Address by Harold H. Greene before the Consumer Federation of America, February 17, 1984 at 9-10 (calling on the FCC to modify its policies).

Other cases in which the trial court's opinion contains strong statements of personal views include: *United States* v. *Kelly*, 539 F. Supp. 363, 373, 377-78 (D.D.C. 1982), *rev'd on other grounds*, 707 F.2d 1460

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has the expression of such views been found to constitute bias.[33]

The court of appeals' decision in this case thus falls squarely in the mainstream of judicial precedent. As required by the presumption of regularity, the court viewed the issues of bias and personal prejudgment as issues with respect to which SPCC had the burden of persuasion. And as noted above, it examined every argument advanced and every fact cited by SPCC in support of its charges. Thus, SPCC's real complaint is not that the court of appeals failed to act in accordance with the law but that it found more than sufficient evidence in the record to conclude that Judge Richey did not approach the case with a preconceived view of

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(D.C. Cir.), *cert. denied*, 104 S.Ct. 264 (1983) (criticizing the "Abscam" operation as "offensive to me" and a "loose cannon rolling around the deck of the criminal justice system"); *Perkins* v. *North Carolina*, 234 F. Supp. 333, 340 (W.D.N.C. 1964) (Craven, J.) (calling on the North Carolina legislature to revise its statute which made homosexual acts a felony with a sentence of 5 to 60 years imprisonment); *United States* v. *Kilpatrick*, 575 F. Supp. 325 (D. Colo. 1983) (sharply criticizing the conduct of the IRS in conducting the grand jury investigation at issue); *EEOC* v. *Union Camp Corp.*, 536 F. Supp. 64, 66 (W.D. Mich. 1982) (criticizing the litigation policies of the EEOC). *See also Dronenburg* v. *Zech*, 746 F.2d 1579, 1583 (D.C. Cir. 1984) (Statement of Bork, J.).

[33]Indeed, the presumption of regularity has not been disturbed even when the judge has expressed views that appear to indicate that the judge does not personally agree with certain policies touching on an issue in the case before him. *See, e.g.*, *Whitehurst* v. *Wright*, 592 F.2d 834, 837-38 (5th Cir. 1979) (district court's statement did not constitute bias where court, prior to ruling for defendants in suit against city mayor and police chief for civil rights violation, said that "I don't think people ought to be sued lightly. To be sued within itself is a pretty severe punishment and it bothers me a good deal that people get sued for doing their duty"); *Smith* v. *Danyo*, 585 F.2d 83, 87 (3d Cir. 1978) (rejecting a bias claim in a diversity personal injury case based on prior statement of the trial judge that he did not believe that diversity personal injury cases belonged in federal court); *Lawton* v. *Tarr*, 327 F. Supp. 670 (E.D.N.C. 1971) (Judge Craven's admitted "vehement opposition" to Vietnam War, expressed in a speech and in letters to President Johnson, did not require disqualification in a selective service case).

the merits; that he maintained an open mind throughout the trial;[34] that the findings he signed in fact reflected his analysis of the merits;[35] and that he did not permit his personal views to influence impermissibly the decision on the merits.[36]

In sum, the court of appeals properly held, using well-established principles laid down by this Court, that SPCC had not established its claim of bias. SPCC has provided neither applicable precedent nor any reasoned basis for this Court to review that decision, and the petition should accordingly be denied.

CONCLUSION

By answering in some detail the charges raised by SPCC against Judge Richey, AT&T does not mean to imply that these charges are anything other than wholly baseless and irresponsible. As the court of appeals determined, a review of the record in this case leads to only one conclusion—that Judge Richey conducted a trial that was a model of fairness, that he carefully reviewed the evidence before him, and that he ruled on the merits using fully appropriate legal standards. In short, Judge Richey's resolution of the case was consistent with the highest standards of the judicial system. Moreover, even the personal views expressed by Judge Richey at the end of his decision are difficult to criticize. Indeed, many believe that they only make him seem to be a proph-

[34] In reviewing the record the court of appeals specifically employed the test announced by this Court in *FTC* v. *Cement Institute*, 333 U.S. 683, 701 (1948)—whether the record showed that the trial court manifested "an irrevocably closed mind" to the merits of the case (App. A-19).

[35] In rejecting SPCC's argument the court of appeals said: "[e]ven apart from our presumption of regularity, however, we find that there is reason to believe that the Memorandum Opinion may reflect the actual thinking of the District Judge on the issues" (App. A-26-27).

[36] Indeed, Judge Richey had emphasized during the trial that he would not permit his personal views to interfere with the proper antitrust analysis (Tr. 3982) and that he would decide the case "properly" after "a great deal of time in study" (Tr. 1747-48, 1638).

et in light of the events that have occurred since those views were expressed.

Litigants are entitled to one fair trial on the merits; but dissatisfaction with the result does not mean that the trial was not fair. Nor does it justify a vicious attack upon the trial judge in the hope that an appellate court will let the losing side start the case again before another trier of fact. Yet, at bottom, that is what SPCC did in the court of appeals and what it is now doing in this Court. SPCC chose to try its case to Judge Richey, thanked him at the end of the trial for his "patience" and "goodwill towards the parties" (Tr. 6048), but now attacks him as biased and unprofessional because he ruled against SPCC on the merits. Respondents respectfully submit that SPCC's assertions are patently frivolous—as already determined by the court of appeals—and do not belong in this Court.

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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